COMMENT ON JUDGE JOSEPH F. WEIS, JR., *SERVICE BY MAIL—IS THE STAMP OF APPROVAL FROM THE HAGUE CONVENTION ALWAYS ENOUGH?*

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I

INTRODUCTION

Judge Weis's article frames important practical lessons. We start in the United States with a plaintiff who plans to sue on a commercial or products liability claim; her seller and anticipated defendant, a Japanese company, lacks a wholly owned subsidiary in the United States. Each "party is free to select the best law, best remedy, most pleasing procedural system; obtain a quick judgment; and race to enforce it."[1] The plaintiff seeks service that will secure home court jurisdiction before the statute of limitations runs, her choice of forum substantive law, and a judgment she can collect in Japan, if necessary.[2] The great opponents of change—ignorance, habit, and expense—militate against the sound practical advice to plaintiff that leaps from Judge Weis's article: if possible, the plaintiff should serve process through the Central Authority.[3]

II

CIVIL PROCEDURE AND FOREIGN RELATIONS

Let me focus on the intersection of U.S. procedural policymaking and the treaty power and foreign relations. Judge Weis's article explores two themes that run through U.S. civil procedure. The first is counterintuitive instrumentalism: rulemakers and courts emphasize management and processing

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I thank Judge Weis and the rest of the symposium contributors for providing a useful framework for debate and discussion of important issues under the Hague Service Convention. The articles are bristling with technicality, and I commend them to every lawyer who is interested in these issues.

1. Louise Ellen Teitz, *Taking Multiple Bites of the Apple: A Proposal to Resolve Conflicts of Jurisdiction and Multiple Proceedings*, 26 INT'L LAW. 21, 29 (1992).

2. Other plaintiffs may regard U.S. jurisdiction and substantive law to be crucial in patent, copyright, trademark, antitrust, securities, and discrimination controversies.

3. The Honorable Joseph F. Weis, Jr., *Service by Mail—Is the Stamp of Approval from the Hague Convention Always Enough?*, 57 LAW & CONTEMP. PROBS. 165 (Summer 1994); *see also* GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 208 (1989); *see generally id.* at 119-70 (providing additional helpful background for the U.S. practitioner).

based on the unarticulated notion that to aid an efficient system, people involuntarily caught up in it will cooperate with alacrity in their own undoing. Paradigm examples include waiver of service of process and automatic discovery, each neatly backstopped with Rule 11 sanctions to deter litigants' self-preservation instincts.[4]

Underlying pragmatism is the second, less fully articulated, theme: hermetic definitions of sovereignty which date from Justice Field's nineteenth-century conceptualism in *Pennoyer v. Neff*.[5] The *Schlunk* and *Melia* decisions Judge Weis discusses are based on the *Pennoyer* theory: that the state, which lacks power outside its borders, nevertheless has complete power over potential defendants within those borders.[6] The pragmatic antidote to *Pennoyer*'s rigid view of sovereignty is administered by fictional domestic agency which allows the forum to tell itself and the defendant's home base that, because of the fictional agency, service occurred within the forum. The profession has assimilated these views of sovereignty and such fiction into its vernacular so completely that sometimes we forget they persist. Judge Weis examines the *Schlunk* and *Melia* opinions solely in terms of whether each service of process was likely to result in actual notice to defendant; he did not touch on any theories of sovereignty or jurisdictional powers upon which the decisions might be based.

Professor Steve Burbank has advanced the point that jurisdiction and service of process possess different qualities.[7] Jurisdiction is obtained by exercise of the state's power, whereas service of process affords defendant notice and the opportunity to mount a defense. International service blends these two features. Ritual, etiquette, mumbo jumbo, or whatever each of us calls it, is inherent in the nature of sovereignty and territorialism; so long as shared norms are lacking, the service ritual will persist. Our world is not the world.[8] Differences in language may skew translated communication. Language contains and conveys substantial assumptions about law and society; shared tradition may even give rise to divergent interpretations when they are colored by local shades of meaning and nuance. Commercial and transactional complexity creates confusion, which only exacerbates incomplete communication.

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4. FED. R. CIV. P. 4(d), 26(g).

5. 95 U.S. 714 (1877).

6. Weis, *supra* note 3, at 174-76; Burnham v. Superior Court, 495 U.S. 604 (1990) (approving jurisdiction over a defendant who was merely tagged within California).

7. Stephen B. Burbank, *The World in Our Courts*, 89 MICH. L. REV. 1456, 1474 (1991).

8. Judge Weis's article was presented between the fifth and sixth games of the 1992 baseball World Series between the Canadian Toronto Blue Jays and the U.S. Atlanta Braves. The "international" World Series was a subtext of the conference by virtue of the presence of several Canadians, including Garry Watson, a speaker at the conference. When an underinformed U.S. commentator, this one, mentioned that the historically domestic nature of the series illustrated how easy it was to think that our world is the world, Mr. Watson graciously educated the group by pointing out that the name of the World Series came from the original sponsor, a newspaper named "The World." Postscript: Toronto won the series in extra innings of the sixth game shortly after the conference ended.

III

RECENT DEVELOPMENTS

Many of the world's legal systems regard the beginning of a lawsuit as a more serious communication than a late utility bill.[9] The new Federal Rule of Civil Procedure 4 allows a plaintiff to seek a waiver of service of process from a foreign nation defendant; if defendants, lacking good cause, decline to waive, then the cost of effecting formal service might be imposed. In proposing the revised rule, the Advisory Committee on the Federal Rules of Civil Procedure observed that a request for waiver "is a private, nonjudicial act that does not purport to effect service or constitute any directive from a court,"[10] which waiver "will not offend foreign sovereignties, even those that have withheld their assent to formal service by mail."[11] This is true only for those who believe it. Declining to charge costs to a defendant who churlishly claims that its government prohibits waivers of service may not ameliorate the sting.[12]

The most significant feature of the last quarter of the twentieth century has been the attraction and revulsion between the center and the fringes of political power that in succession pulled Western European states together to form the European Economic Community and fragmented the former states of the Soviet Union and Yugoslavia. While sovereignty has never been more in doubt, the observer may predict that claims of sovereignty will never be more vigorously asserted. Cries of sovereignty will cloak governments' parochial protection for local corporations, wrongdoers' scorched earth defenses, and practitioners' preservation and acquisition of legal business. Complexity, ambiguity, and change—and not just at the fringes—will mark international litigation as no preserve for the sluggish and inastute. The international litigant walks in the land of big feet, thin shoes, and tender toes.

IV

CONCLUSION

I express my hope that the development of the Federal Rules of Civil Procedure and judicial decisions rendered in the service of simplicity and economy be made with care so as not to subordinate the ritual and formal aspects of others' sovereignty. Our legal system pays homage to our sovereignty myths with fictional agencies. Recognizing that should help us do a bit more to respect other nations' sensitivities about sovereignty as we develop our internal civil procedure.

As U.S. litigation and rulemaking ascend through stages, the higher stages become less technical and more political. This trend should put trial judges and

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9. BORN & WESTIN, *supra* note 3, at 156-58, 166-67, 177, 185.

10. *Amendments to Federal Rules of Civil Procedure and Forms*, 146 F.R.D. 401, 521 (1992) (proposing rule revisions, which became effective December 1, 1993).

11. *Id.* at 562.

12. *Compare* Burbank, *supra* note 7, at 1476, 1483, 1485.

participants in the rulemaking process on notice to work with their eyes on the political dimensions of the process—the executive, legislative, and international dimensions of the particular issues. Of litigation in the thirteenth and fourteenth centuries, Professor Robert Palmer remarked, "Inefficiency, anyway, is never any society's worst enemy, no matter how annoying or expensive it might be."[13] Nor is complexity.

13. ROBERT C. PALMER, THE WHILTON DISPUTE, 1264-1380: A SOCIAL-LEGAL STUDY OF DISPUTE SETTLEMENT IN MEDIEVAL ENGLAND 215 (1984).